88-974

No.

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7,
Petitioner,

VS.

JOHNNY S. SHORT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

RONALD L. DAY*
WILLIAM G. SMITH*
LAURIE W. JONES
FENTON, FENTON, SMITH, RENEAU AND MOON, P.C.
One Leadership Square
Suite 800
211 North Robinson
Oklahoma City, OK 73102
(405) 235-4671
Counsel for Petitioner

* Counsel of Record

December 12, 1988

QUESTION PRESENTED FOR REVIEW

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

This action involves the nonrenewal of a tenured teacher's contract by the Petitioner School District. After notice to the teacher by the School Board, and after an evidentiary hearing before a hearing panel as provided by the Oklahoma School Code, the teacher's contract was not renewed and the teacher appealed. On appeal, the Supreme Court of Oklahoma approved the findings and decisions of the lower court as to the nonrenewal of the teacher, but held the provisions of the Oklahoma Statute involved were unconstitutional, to be applied prospectively only. This decision raises the following question for review:

1. Is Oklahoma's teacher termination statute, Okla. Stat. tit. 70, §6-103.4 (1981), which provided for notice by the School Board and for a hearing before a hearing panel before a termination or nonrenewal would take effect, unconstitutional for failing to provide a pre-termination hearing consistent with *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. FEDERAL LAW AND THE UNITED STATES CONSTITUTION AS JUDICIALLY CONSTRUED CONTROLLED THE STATE COURT DECISION	8
II. DUE PROCESS REQUIREMENTS ARE SATISFIED BY OKLA. STAT. TIT. 70, §6-103.4, AS NOTICE AND AN OPPORTUNITY TO BE HEARD IS AFFORDED PRIOR TO THE FINAL EMPLOYMENT DECISION	11
CONCLUSION	15
CERTIFICATE [Rule 28.4(c)]	16
APPENDIX A — Decision of the Oklahoma Supreme Court.	
APPENDIX B — Decision of District Court of Choctaw County.	
APPENDIX C — Decision and Order of the Hearing Panel.	
APPENDIX D — Order of the Oklahoma Supreme Court denying rehearing.	

TABLE OF AUTHORITIES

Cases: Page

Bell v. Burson, 402 U.S. 535 (1971) 11

Boddie v. Connecticut, 401 U.S. 371 (1971) 11

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 12

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) .... (i), 1, 5, 8, 9, 10, 12, 13, 14

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 12

Goss v. Lopez, 419 U.S. 565 (1975) 12

Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979) 6

Michigan v. Long, 463 U.S. 1032 (1983) 9, 10

Opp Cotton Mills v. Administrator of Wage & Hour Division of Dept. of Labor, 312 U.S. 126 (1941) 11

Short v. Kiamichi Area Vo-Tech School, 761 P.2d 472 (Okla. 1988) 2, 8, 14, 15

State of Minnesota v. National Tea Co., 309 U.S. 551 (1940) 9

Terry v. Ohio, 72 U.S. 1 (1968) 10

Statutes:

28 U.S.C. §1257(3) 2

Ohio Rev. Code Ann. §124.11 (1984) 12

Okla. Stat. tit. 70, §6-103 (1979) 6

Okla. Stat. tit. 70, §6-103.4 (1981) ..... (i), 1, 2, 4, 6, 11, 14

Okla. Stat. tit. 70, §6-103.4(A), (B), (D) (1981) 8

Okla. Stat. tit. 70, §6-103.5 (1981) 13

	Page
Okla. Stat. tit. 70, §6-103.11 (1981)	7, 13
Okla. Stat. tit. 70, §6-103.11(B) (1981)	8
Okla. Stat. tit. 70, §6-103.12 (1977)	7, 13
Okla. Stat. tit. 75, §310 (1963)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No.

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7,
Petitioner,

VS.

JOHNNY S. SHORT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner, Kiamichi Area Vocational-Technical School District No. 7, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of Oklahoma which held that Oklahoma's teacher termination statute, Okla. Stat. tit. 70, §6-103.4 (1981), was unconstitutional insofar as it fails to provide a *Loudermill* pre-termination hearing.

OPINIONS BELOW

The opinion, dissenting opinion, and appendix of the Supreme Court of the State of Okla-

homa is reported at 761 P.2d 472 (Okla. 1988), and is reprinted in the appendix hereto. See App. A, 1a-25a.

The Opinion of the District Court of Choctaw County, State of Oklahoma, is reprinted in the appendix, See App. B, 1b-3b.

The decision and order of the administrative hearing panel is reprinted in the appendix. See App. C, 1c-7c.

JURISDICTION

The opinion of the Supreme Court of the State of Oklahoma was entered on July 19, 1988. The parties each timely filed a Petition for Rehearing. The Supreme Court of the State of Oklahoma denied rehearing on September 13, 1988. The jurisdiction of this Court is requested under 28 U.S.C. §1257(3), which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . ."

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The due process clause of the fourteenth amendment to the United States Constitution is involved in this case. The statute found in violation of that Constitutional provision is Okla. Stat. tit. 70, §6-103.4 (1981), as follows:

> §6-103.4 Dismissal or nonreemployment of teacher — Procedure

A. Whenever a superintendent of a school district determines that cause exists for the dismissal or nonreemployment of a teacher employed within the school district, he or she shall submit a recommendation in writing to the board of education for such school district. In the case of a tenured teacher, the recommendation shall contain the one or more statutory grounds for the potential dismissal or nonreemployment. The recommendation for the dismissal or nonreemployment of either a tenured or a probationary teacher shall be approved or rejected upon a majority vote of the board's members.

B. If the local board of education approves the recommendation of the superintendent, or determines on its own volition that a teacher should be dismissed or nonreemployed, the board shall cause written notice of the dismissal or nonreemployment to be mailed by certified mail, restricted delivery, with return receipt requested, to the teacher who is the subject of the action. In the case of a tenured teacher, the notice shall state the one or more statutory grounds for the dismissal or nonreemployment and the right of the teacher to have a hearing conducted by a hearing panel. In the case of a probationary teacher whose contract is not being renewed, the notice shall state the cause for nonrenewal and the right of the teacher to have a due process hearing conducted by the board of education. Pending final determination of a tenured or probationary teacher's dismissal or nonreemployment, the local board may have the teacher suspended if the board determines that the best interests and welfare of the students in the school district require such action. Such

suspension shall not deprive the teacher of any compensation or other teaching benefits to which he or she would otherwise be entitled by law or pursuant to his or her teaching contract.

C. Within ten (10) days of receipt of the notice, the tenured or probationary teacher shall notify by certified mail, restricted delivery with return receipt requested, the clerk of the local board of education of his or her respective decision.

D. If a tenured teacher fails to notify the clerk of the local board of education within the ten-day period of his or her desire to have a hearing on his or her dismissal or nonreemployment conducted by a hearing panel, the teacher shall be deemed to have waived his or her right to a hearing and the initial determination of his or her dismissal or nonreemployment by the board of education shall become final and nonappealable. If, within the ten-day period, the tenured teacher notifies the clerk of the local school board of his or her desire for a hearing conducted by a hearing panel, the clerk shall, not later than the end of said period of time, notify the State Superintendent of Public Instruction of such request.

E. If a probationary teacher . . . (not applicable).

STATEMENT OF THE CASE

Oklahoma's teacher termination statute, Okla. Stat. tit. 70, §6-103.4 (1981), was found unconstitutional by the Oklahoma Supreme Court insofar as it was interpreted to fail to provide for

a "pre-termination" hearing, as recognized in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985).

The Respondent teacher, Johnny Short, was originally employed by the Petitioner in 1974 to instruct a residential wiring course at the school and became a tenured teacher. In 1982, the Board determined it was necessary to convert the residential wiring course into an industrial electricity/electronics course. In 1982, Short was notified of the change in the course and agreed to take the actions necessary to become qualified and certified to instruct the new course which was to commence in the fall of 1985-86 school term. Mr. Short held a provisional teaching certificate in electricity which had an expiration date of June 30, 1985.

Despite admonitions of the administration regarding the need for certification and continuing education responsibilities, Mr. Short took no affirmative steps towards becoming qualified until the spring semester of 1985, more than two and a half years after he was told of the needs for such certification.

After a formal evaluation, on February 12, 1985, the school superintendent sent a letter again advising Mr. Short that he would have to be qualified and certified to teach the new course if he desired to be reemployed and his teaching contract renewed for the succeeding 1985-86 school year. In March, 1985, Short took the examination to become certified in the field of electronics. He failed the certification test and remained uncertified. The Board of Education was

notified that Mr. Short failed the certification test.

After consideration of Mr. Short's lack of qualifications and pursuant to Okla. Stat. tit. 70, §6-103.4 (1981), on April 2, 1985 the Board of Education sent Mr. Short a certified letter informing him that his contract would not be renewed for the succeeding 1985-86 school year on the grounds of willful neglect of duty[1] for his failure to prepare for and obtain certification as a electricity/electronics instructor. The letter of nonrenewal also advised of Short's right to a due process hearing before a hearing panel as provided in the subject Oklahoma Statute, and further advised the Board would consider rehiring Short if he became certified as an industrial electricity/electronics instructor prior to August 1, 1985. Within the time provided by statute, Mr. Short requested a due process hearing before a hearing panel. Procedures for assembling and hearing before the hearing panel were promptly commenced.[2] While awaiting the hearing, Re-

---

[1] As a tenured teacher, Mr. Short's contract could only be nonrenewed on one of the grounds enunciated in Okla. Stat. tit. 70, §6-103 (1979). Among those statutory grounds for nonrenewal is willful neglect of duty. Failure to obtain necessary certification for continued employment has been held to constitute willful neglect of duty. *Harrah Indep. School Dist. v. Martin*, 440 U.S. 194 (1979).

[2] Okla. Stat. tit. 70, §6-103.4 (1981) provides that tenured teachers shall have a due process hearing before a hearing panel consisting of one hearing judge who is required to be an attorney, and two other individuals, one appointed by the teacher and one by the local Board of Education. The hearing is governed by the Rules of Evidence found at Okla. Stat. tit. 75, §310 (1963), and the parties are afforded the following rights: 1) to have counsel of his own choice present; 2) to present witnesses in person or by interrogatories, affidavits, or depositions. A list of witnesses shall be furnished to the party at least five (5) days prior to the hearing; 3) to testify in his own behalf and give reasons for any actions or policies; 4) to have an orderly hearing; 5) to have a fair and impartial decision based upon the evidence; and 6) to have an official transcript of the hearing made.

spondent Short continued teaching classes and was paid his full salary and benefits. Short continued to teach and receive compensation and benefits during the remainder of the 1984-85 school year in accordance with his tenured teacher's contract.

Mr. Short's hearing was originally scheduled in May, 1985, *prior* to the effective date of the proposed nonrenewal. However, Mr. Short requested and received a continuance of the hearing and stipulated to waive statutory time limitations.

The due process hearing before the appointed hearing panel was conducted on June 24 and 25, 1985. This too was prior to the end of the fiscal school year, and prior to the expiration of Mr. Short's contract. After a two day hearing, the independent hearing panel upheld the School Board's initial preliminary notice of nonrenewal on the grounds of willful neglect of duty as described in the appropriate statute.[3]

Mr. Short appealed the hearing panel's decision to the district court of Choctaw County in accordance with provisions of Okla. Stat. tit. 70, §6-103.12 (1977). The district court entered an order affirming the decision of the hearing panel. Respondent Short then appealed the decision from the district court to the Oklahoma Supreme Court primarily based upon a claim

---

[3] The hearing judge prepares a written report within thirty (30) days from the time the hearing judge is chosen and submits copies to the teacher and superintendent of the district. The report contains an outline of the scope of the hearings, findings of fact and conclusions of law, and a decision to either uphold the board's action for dismissal or nonreemployment, or reinstate the teacher. Okla. Stat. tit. 70, §6-103.11 (1981).

that the decisions of the Board, hearing panel and district court were procedurally improper, clearly erroneous and in violation of constitutional provisions.

The Oklahoma Supreme Court determined that the prescribed prerequisites for nonrenewal of a tenured teacher under Okla. Stat. tit. 70, §6-103.4(A), (B), (D) (1981), had been met; that the decision was not clearly erroneous; and the hearing panel's decision followed the statutory requirements of Okla. Stat. tit. 70, §6-103.11(B) (1981). While the Supreme Court found Mr. Short's contract was properly nonrenewed in accordance with the requirements of the Oklahoma statutes, the Oklahoma Supreme Court ruled that Okla. Stat. tit. 70, §6-103.4(B) (1981), was prospectively unconstitutional and infirm due to its perceived failure to provide a pre-termination due process hearing before the School Board, as enunciated in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985). The court further determined such holding to be given purely prospective effect. *Short v. Kiamichi Area Vo-Tech School,* 761 P.2d 472 (Okla. 1988).

REASONS FOR GRANTING THE WRIT

I. FEDERAL LAW AND THE UNITED STATES CONSTITUTION AS JUDICIALLY CONSTRUED CONTROLLED THE STATE COURT DECISION.

The Oklahoma Supreme Court based its decision that the subject Oklahoma Statute is unconstitutional wholly on its interpretation of federal law and federal constitutional principles. While it is fundamental that state courts be left

free and unfettered to interpret their state constitutions, it is equally important that ambiguous or obscure adjudications by state courts do not bar a determination by this Court of the validity under the federal constitution of state action. *State of Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

This Court will assume that there are no adequate independent state grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law. This Court requires a "plain statement" that a decision rests upon adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). When a state court decision fairly appears to rest primarily on federal law or to be interwoven with federal law, and when adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

It is precisely that lack of a clearly enunciated, separate, adequate and independent ground for its decision that makes the Oklahoma Supreme Court's decision appropriate for writ of certiorari. The Oklahoma Supreme Court found that under *Loudermill*, due process requires that a tenured teacher be given an opportunity to be heard prior to the school board's nonrenewal decision. While the state court held the right to a pre-termination hearing for tenured teachers

was mandated by both the state and federal constitutions, the opinion is devoid of any citation to the pertinent state constitutional provision.[4]

In *Michigan v. Long,* 463 U.S. 1032 (1983), the state court opinion from which certiorari was sought included two citations to the state constitution. However, the lower court relied exclusively on its understanding of *Terry v. Ohio,* 72 U.S. 1 (1968) and other federal cases to support the holding that the search of a passenger compartment was unconstitutional. Not a single state case was cited as authority for the holding. This Court found that references to the state constitution in no way indicated that the decision below rested on grounds in any way independent from the state court's interpretation of federal law. The state court clearly stated that it based its decision upon the principles enunciated in *Terry.* This Court granted certiorari in that case.

Likewise, the Oklahoma Supreme Court repeatedly referred to *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985), and explicitly stated that that case dictated the court's decision. Quite clearly, the court felt constrained to decide the contitutional issues as it did due to principles promulgated in *Loudermill* and determined the decision would be given purely prospective effect. One scant general reference

---

[4] The state court opinion has a heading that "The Right to a Pretermination Hearing for Tenured Teachers is Mandated by Both the State and Federal Constitutions". The court then notes the teacher argues he has been deprived of procedural due process under both the United States and Oklahoma Constitutions. This is the sole reference to the State Constitution in this opinion. Review of the teacher's briefs to the lower court reveals a lack of any citation to state constitutional provisions.

to the state constitution in a heading is not sufficient to serve as adequate and independent state grounds. The lower court's opinion here falls short of the required "plain statement" of independent state grounds. The Court must grant certiorari as state courts cannot be the final arbiters of important issues decided under the federal constitution.

II. DUE PROCESS REQUIREMENTS ARE SATISFIED BY OKLA. STAT. TIT. 70, §6-103.4, AS NOTICE AND AN OPPORTUNITY TO BE HEARD IS AFFORDED PRIOR TO THE FINAL EMPLOYMENT DECISION.

It has long been held that:

> The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. *Opp Cotton Mills v. Administrator of Wage & Hour Division of Dept. of Labor,* 312 U.S. 126, 152 (1941).

It is fundamental that due process requires that when a State seeks to terminate an interest, it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective. *Bell v. Burson,* 402 U.S. 535 (1971). The formality and procedural requisites for the hearing can vary depending upon the importance of the interest involved and the nature of the subsequent proceedings. *Boddie v. Connecticut,* 401 U.S. 371 (1971).

The "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961). Thus, in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985), this Court pointed out that "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures." *Id.* at 547 n.12. For these reasons, this Court cautioned its "holding rest[ed] in part on the provisions of Ohio law for a full post-termination hearing." *Id.* at 546. In Oklahoma, there are no *post*-termination evidentiary proceedings except appeals, because the teacher receives a full adversarial trial type hearing *before* the proposed termination takes effect and becomes final. Oklahoma's and Ohio's statutes could not be more different. *Loudermill* is, therefore, distinguishable.

Several months *after* Mr. Loudermill was discharged, removed and stopped receiving wages, he received an evidentiary hearing with the Civil Service Commission pursuant to Ohio Rev. Code Ann. §124.11 (1984). He alleged Ohio's statute was unconstitutional because it did not provide him an opportunity to respond to the charges (falsifying his employment application) "prior to removal." This Court agreed and held that an employee with a property interest must be given a meaningful opportunity to present his side of the case "before the termination takes effect." *Id.* at 543 (citing *Goss v. Lopez,* 419 U.S. at 583-584 and *Gagnon v. Scarpelli,* 411 U.S. 778, 784-786).

In Oklahoma, a teacher receives a complete evidentiary due process hearing — like the post-termination hearing referred to in *Loudermill* —

before the school board's decision on the proposed nonrenewal becomes final. Okla. Stat. tit. 70, §6-103.12 (1977) specifically states it is the decision of the hearing panel, not the Board of Education, which is final with respect to nonrenewal.[5] In Oklahoma, nonrenewal does not take effect until the hearing panel decides the case. Thus, under this statute an employee is afforded a complete evidentiary due process hearing before the termination takes effect — the critical point in time with which *Loudermill* was concerned.

Loudermill teaches it is the School Board's interest in immediate or summary termination which necessitates the pre-termination procedures mandated. This Court pointed out both sides would benefit if the "employee's labors continued until pre-termination rights were afforded." This Court noted in those situations where the employer perceived a signficiant hazard in keeping the employee on the job, it could avoid the problem by "suspending with pay"

---

[5] The statutory deadline for notification of contract nonrenewal is April 10th of a given school year. The teacher must notify the board clerk of a request for a hearing within ten (10) days after receipt of notice of proposed nonrenewal. The Superintendent of Public Instruction then has ten (10) days within which to designate 21 individuals eligible to act as hearing judge. The teacher and the Board then have twenty (20) days to select the judge. Okla. Stat. tit. 70, §6-103.5 (1981). Within thirty (30) days from the time a hearing judge was been chosen, the hearing panel shall complete the hearing, prepare a written report of their decision, and submit the report to the teacher and superintendent of the school district. Okla. Stat. tit. 70, §6-103.11 (1981). Thus, the hearing panel's decision is rendered before June 30th, which is the expiration date for teacher contracts.

Mr. Short, however, requested a continuance of his hearing date from May 31, 1985, until June 24, 1985. Mr. Short and his counsel waived any objections to the hearing on the latter date, and waived any objections to the date of the hearing panel's decision. Thus, any delay in rendering the final decision on Mr. Short's employment was at his own request.

without affording pre-termination procedures. These same safeguards are built into Oklahoma's statutory scheme. In Oklahoma, an employee continues working and continues to receive pay, even if suspended, following notice of proposed nonrenewal.

Mr. Short's employment contract was not renewed for school year 1985-86. He was neither removed from his position nor denied compensation in April, 1985, when the Board sent him notice of proposed contract nonrenewal. He was not terminated when he received his notice. Rather, he continued to teach and receive compensation and benefits during the remainder of the 1984-85 school year. He was afforded a complete due process hearing prior to the end of his contract term. Because Mr. Short was not terminated when he received notice, there is no need for the protection of a pre-termination hearing at any point in time prior to the full evidentiary hearing afforded pursuant to Okla. Stat. tit. 70, §6-103.4 (1981).

As Justice Simms in his dissenting opinion in *Short* succinctly stated:

> Due process requires notice and the opportunity for a pretermination hearing before the employee is *deprived* of that protected property interest.
>
> In my view, that is precisely what our statutes provide. They fully meet the requirement of *Loudermill* by affording an employee notice of the charges and a complete due process hearing providing an

> opportunity to respond and present his side of the story prior to the time the "termination takes effect".

Short v. Kiamichi Area Vo-Tech School, 761 P.2d at 479; App. A, 14a-15a.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

RONALD L. DAY,*
WILLIAM G. SMITH*
LAURIE W. JONES
FENTON, FENTON, SMITH,
RENEAU & MOON
One Leadership Square
Suite 800
211 North Robinson
Oklahoma City, Oklahoma 73102
(405) 235-4671

Counsel for Petitioner

* Counsel of Record

December 12, 1988

CERTIFICATE

Pursuant to Rule 28.4(C) of the Supreme Court, 28 U.S.C. §2403(b) may be applicable herein and this is to certify that a copy of the Petition for a Writ of Certiorari has been served upon the Attorney General of the State of Oklahoma.

RONALD L. DAY*
WILLIAM G. SMITH*
LAURIE W. JONES
FENTON, FENTON, SMITH,
RENEAU & MOON, P.C.
One Leadership Square
Suite 800
211 North Robinson
Oklahoma City, OK 73102
(405) 235-4671

Counsel for Petitioner

* Counsel of Record

APPENDICES

APPENDIX A

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 66,179

JOHNNY M. SHORT,
Appellant,

v.

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT
NO. 7 OF CHOCTAW COUNTY, OKLAHOMA,
Appellee.

[Filed July 19, 1988]

Appeal From the District Court
of Choctaw County, Oklahoma
Honorable G. Gail Craytor, District Judge

This appeal involves the nonrenewal of a tenured teacher's contract by the Kiamichi Area Vocational-Technical School District. The teacher asserts that the failure of the school board to afford a pretermination hearing before it decided to nonrenew his contract was a denial of procedural due process. We find that under *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), due process requires that a tenured teacher be given an opportunity to be heard prior to the school board's nonrenewal decision. We also find that the rule in this case is applicable prospectively only, and that it will become effective on the date of the issuance of the mandate. *Great N. Ry. Co.* v. *Sunburst Oil & Refining Co,* 287 U.S. 358, 364-65, 53 S.Ct. 145, 148, 77 L.Ed. 360, (1932).

REVERSED

Oklahoma Education Association — For Appellant
by Karen L. Long
Oklahoma City, Oklahoma

Fenton, Fenton, Smith, Reneau
& Moon — For Appellee
by Ronald L. Day

KAUGER, J.,

The four questions presented concerning the nonrenewal of a tenured teacher's contract are: (1) whether the school district/appellee failed to follow the Oklahoma School Code, 70 O.S. 1981 §6 103.4 (A) (B) (D) in its action for nonrenewal; (2) whether the decisions of the hearing panel and of the district court upholding the teacher's dismissal were based upon insufficient evidence, and thus clearly erroneous under 70 O.S. 1981 §6-103.9 (A); (3) whether the hearing panel's decision conformed with 70 O.S. 1981 §6-103.11 (B) by outlining the scope of the hearing and making findings of fact and conclusions of law directing nonrenewal; and (4) whether procedural due process requires that a tenured teacher be afforded a pretermination hearing before his teaching contract is either terminated or nonrenewed under *Cleveland Bd of Educ.* v. *Loudermill,* 470 U.S. 532, 545, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494, 503-04 (1985).

We find that: (1) the prescribed prerequisites for nonrenewal under 70 O.S. 1981 §6-103.4 (A) (B) (D) were met by the Board; (2) the decision of the hearing panel which was based upon a preponderence of the evidence pursuant to 70 O.S. 1981 §6-103.9 (A) was not clearly erroneous; (3) the Panel's decision followed the statutory requirements of 70 O.S. 1981 §6-103.11 (B). The dispositive question presented is whether procedural due process requires that a tenured teacher be afforded a pretermination hearing before his teaching contract is either terminated or nonre-

newed. We find that pretermination hearings for tenured teachers are constitutionally mandated under *Cleveland Bd. of Educ.* v. *Loudermill,* supra.

FACTS

In 1974, Johnny M. Short, appellant/teacher, was employed by the Kiamichi Area Vocational-Technical School District, appellee, to teach a residential wiring course. After a decline of enrollment in the course, coupled with an increased demand for skilled electronics students, the residential wiring course was converted to an industrial electricity/electronics course.

On April 2, 1985, the School board advised the teacher by certified mail that his teaching contract was being nonrenewed. The Board found that the teacher's failure to secure certification as an electronics instructor constituted wilful neglect of duty. The teacher admits that he knew of the planned transition in the course as early as 1982. Nevertheless, he disputes the date upon which he was notified that his continued employment hinged upon his certification in electronics. The teacher contends that he was first informed on January 28, 1985, that the certification in electronics was a prerequisite to teaching the industrial electricity/electronics course. However, the school district presented evidence in posttermination proceedings that the teacher knew as early as August of 1982, that a major transition was occuring in the residential wiring course and that proficiency in electronics would be required.

In accordance with 70 O.S. 1981 §6-103.4(D),[1] the

---

[1] Title 70 O.S. 1981 §6-103.4(D) provides:

"If a tenured teacher fails to notify the clerk of the local board of education within the ten-day period of his or her desire to have a hearing on his or her dismissal or nonreemployment conducted by a hearing panel, the teacher shall be deemed to have waived his or her right to a hearing and the initial

teacher sought review of the Board's action before an administrative hearing panel (Panel). The Panel voted 2-1 to uphold the Board's decision. Its decision was affirmed by the district court, and the teacher appealed.

I

THE RIGHT TO A PRETERMINATION HEARING FOR TENURED TEACHERS IS MANDATED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

The teacher argues that he has been deprived of procedural due process under both the United States and Oklahoma Constitutions. Although the teacher asserts other allegations of error in the nonrenewal of his contract, the question of whether a tenured teacher must be afforded a pretermination hearing before dismissal or nonreemployment is one of first impression in Oklahoma.

On March 19, 1985,[2] the United States Supreme Court promulgated *Cleveland Bd. of Educ.* v. *Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 87 L.Ed.2d 494 (1985). The *Loudermill* Court, echoing Justice Powell's concurrence in *Arnett v. Kennedy,* 416 U.S. 134, 167, 94 S.Ct. 1633, 1650, 40 L.Ed. 2d 15, 40 (1974), reh. den. 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed. 2d 1148 (1974), that "the right to due process is conferred not by legislative grace but by constitutional guarantees"[3] held: 1) due process requires that tenured public employees must

---

determination of his or her dismissal or nonreemployment by the board of education shall become final and nonappealable. If, within the ten-day period, the tenured teacher notifies the clerk of the local school board of his or her desire for a hearing conducted by a hearing panel, the clerk shall, not later than the end of said period of time, notify the State Superintendent of Public Instruction of such request."

[2] We note that the School Board sent its letter on April 2, 1985.

[3] See also, L. Tribe, "American Constitutional Law", p.709, §10-12 (2nd Ed. 1988).

be afforded some form of pretermination opportunity to respond to charges leading to dismissal; and 2) if the termination involves arguable issues, the right to a hearing does not depend on a demonstration of certain success.

Nevertheless, before a pretermination hearing is required, it must be demonstrated that there is an existing right in continued employment.[4] This right must arise from some independent source, e.g. state law, sufficient to create a legitimate claim of entitlement.[5] In *Loudermill,* the Supreme Court found that the Ohio Legislature had created a property interest in continued employment for tenured public employees.[6]

It is undisputed that the teacher is a tenured teacher within the meaning of 70 O.S. 1981 §6-102.1(6).[7] A tenured teacher's right to continued employment may be construed as a property interest subject to due process protection if the Legislature has created the right through statutory enactment.[8] Title 70 O.S. 1981 §6-103.4(A)[9] provides that a tenured teacher may be removed for one or more of the statutory grounds set forth in §6-103(A).[10] Section 6-103(A) provides that

---

[4] *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed. 2d 494, 501 (1985); *Bd. of Regents v. Roth,* 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548, 560-62 (1972).

[5] *Cleveland Bd. of Educ. v. Loudermill,* see note 4, supra; *Bd. of Regents v. Roth,* see note 4, supra. See also, *Paul v. Davis,* 424 U.S. 693, 709, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405, 418-19 (1976); *Wood v. Indep. School Dist. No. 141,* 661 P.2d 892, 894 (Okla. 1983).

[6] *Cleveland Bd. of Educ. v. Loudermill,* see supra note 4 at 538. See also, Ohio Rev. Code Ann. §124.34 (Supp. 1986) providing that classified civil servants may be removed for acts of "misfeasance, malfeasance, or nonfeasance in office."

[7] Title 70 O.S. 1981 §6-102.1(6) provides:

" 'Tenured teacher' or 'probationary teacher' means a duly certificated teacher who has completed three (3) or more consecutive complete school years of teaching service in one school district under a written teaching contract, as provided by law. Provided, however, that a school district

a teacher may be dismissed for cause based on specifically delineated grounds. Pursuant to 70 O.S. 1981 §6-101(E) unless a school board contacts a regularly employed teacher prior to April 10th or unless by April 25th the teacher notifies the board that he/she has no interest in reemployment, the teacher is considered to be employed on a continuing contract basis for the next year.[11]

Under these statutes, a tenured teacher has more than an abstract need, desire, or unilateral expection in continued employment.[12] Instead, the teacher has a legitimate claim of entitlement created by legislative enactment. We have previously recognized that although a teacher has no right to be employed in a particular position, a tenured teacher does have a right to continuing employment.[13]

The school district argues that *Loudermill* should be distinguished based primarily on economic concerns. It argues that tenured teachers, who face dismissal or nonreemployment, have not been deprived of any property right because they continue

---

employing a teacher who has previously held tenure within the state may grant tenure to said teacher upon renewal of said teacher's contract for the second year in the district."

[8] *Wood v. Ind. School Dist. No. 141*, see note 5, supra.

[9] Title 70 O.S. 1981 §6-103.4(A) provides in pertinent part:

"Whenever a superintendent of a school district determines that cause exists for the dismissal or nonreemployment of a teacher employed within the school district, he or she shall submit a recommendation in writing to the board of education for such school district. In the case of a tenured teacher, the recommendation shall contain the one or more statutory grounds for the potential dismissal or nonreemployment. . . ."

[10] Title 70 O.S. 1981 §6-103(A) provides in pertinent part:

". . . any teacher may be dismissed at any time or not reemployed for immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude and any teacher shall be dismissed at any time or not reemployed if convicted of a felony, or if convicted of a felony resulting from a felony violation of the narcotic laws . . ."

to draw wages during the pendency of the hearing before the review panel. They point out that public employees in *Loudermill* lost wages immediately upon dismissal. Not only is an argument that constitutional rights may be purchased in exchange for wages untenable, the record shows that the teacher did not draw a salary for at least a short time before the Panel's decision was rendered, and that the facts were disputed concerning when the teacher learned of the need to secure additional training. The *ratio decidendi* in *Loudermill* is not deprivation of wages, but interference with the legitimate expectation of continued employment — that constitutional guarantees of due process prevail over statutory procedures.[14]

Although *Harrah Indep. School Dist. v. Martin*, 440 U.S., 194, 197, 99 S.Ct. 1062, 1064, 59 L.Ed.2d 248, 253 (1979), did not specifically involve the right to a pretermination hearing, it is instructive. *Martin* held that a tenured teacher had no colorable claim of a denial of due process where the teacher was advised

---

[11] Title 70 O.S. 1981 §6-101(E) provides:

"A board of education shall have authority to enter into written contracts with teachers for the ensuing fiscal year prior to the beginning of such year. If, prior to April 10, a board of education has not entered into a written contract with a regularly employed teacher or notified him in writing by registered or certified mail that he will not be employed for the ensuing fiscal year, and if, by April 25, such teacher has not notified the board of education in writing by registered or certified mail that he does not desire to be reemployed in such school district for the ensuing year, such teacher shall be considered as employed on a continuing contract basis and on the same salary schedule used for other teachers in the school district for the ensuing fiscal year, and such employment and continuing contract shall be binding on the teacher and on the school district. Provided that no district or any member of the board of education of a district shall be liable for the payment of compensation to a teacher under the provisions of the teacher's contract for the ensuing year, if it becomes necessary to close the school because of insufficient attendance, disorganization, annexation, consolidation, or by dispensing with the school according to law, provided, such cause is known or action is taken prior to July 1 of such ensuing year."

of the decision not to renew her contract and of her right to a hearing before the school board, *but that her failure to exhaust state administrative remedies did not defeat her right to prosecute a civil rights action under 42 U.S.C. §1983.* The procedure reviewed in *Martin* was outlined by 70 O.S. Supp. 1976 §6-122,[15] the forerunner to the statute at issue here, 70 O.S. 1981 §6-103.4(B).[16] However, the two statutes differ in one material respect — the statute construed by the *Martin* Court provided a pretermination opportunity to be heard before the school board's decision became final. This is the precise fashion in which §6-103.4(B) falls short of the *Loudermill* standard.

The Legislature's recent enactment of 70 O.S. Supp. 1987 §6-102.4[17] providing for the necessary procedural steps a board of education or school district must follow prior to the dismissal or nonreemployment of a full-time school administrator is also illuminating. Subsection (1) of §6-102.4 provides that the administrator shall have the opportunity to a hearing before the local board of education prior to its decision becoming final. It is incongruous that the Legislature intended to afford procedural due process to school administrators, but not to school teachers.[18]

---

[12] This is not a situation where a teacher has absolutely no interest in reemployment for the next year as the teacher did in *Bd. of Regents v. Roth*, see note 4 supra; nor is it a situation where the teacher must come within an implied tenure definition as in *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570, 579-80 (1972), in order for the property interest to attach.

[13] *Maupin v. Ind. School Dist. No. 26*, 632 P.2d 396, 399 (Okla. 1981).

[14] Although the hearing was conducted on June 24-25, 1985, no decision was rendered until August 1, 1985. Short's contract expired on June 30, 1985. It appears no salary was paid from June 30 to August 1. Additionally, *Delaware St. College v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431, 439-40 (1980), indicates that a deprivation can occur at the time the tenure decision is made and communicated even though one of the effects of denial of tenure, loss of a teaching position, does not occur until later.

[15] Title 70 O.S. Supp. 1976 §6-122 (which was repealed in 1977) provides in

Here, the teacher's interest is clearly sufficient to warrant pretermination procedural safeguards. It is apparent that this claim, like the one of tenured public employees in *Loudermill,* arises to the status of a property interest. Once this interest is established, *Loudermill* requires that some form of pretermination hearing be provided. In the absence of a constitutionally adequate pretermination procedure, the nonrenewal failed to pass constitutional muster. *The statute, 70 O.S. 1981 §6-103.4 (B), insofar as it fails to provide a Loudermill pretermination hearing, is unconstitutional.* Post-termination remedies however elaborate, are insufficient; some form of pretermination hearing is required. Contrary to the implication in the dissent, we do not strike down §6-103.4 (B) post-termination proceedings. We simply hold that its procedures must be supplemented by a pretermination opportunity to be heard before the board of education reaches a final decision. A pretermination hearing provides additional protection — not less. (It should be noted that the pretermina-

---

pertinent part:

> "The failure by the board of education to renew the contract of any teacher who has completed three (3) years shall not be effective, and the contract shall be renewed unless the board causes to be served on the teacher a written statement of the causes for such action, which must include one of the following: immorality, wilful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. The teacher shall be afforded an opportunity to appear before the board and confront his accusers, having the right to cross-examine all witnesses and offer any evidence to refute the statements and a reconsideration of the action theretofore made by the board."

[16] Title 70 O.S. 1981 §6-103.4(B), provides:

> "If the local board of education approves the recommendation of the superintendent, or determines on its own volition that a teacher should be dismissed or nonreemployed, the board shall cuse written notice of the dismissal or nonreemployment to be mailed by certified mail, restricted delivery, with return receipt requested, to the teacher who is the subject of the action. In the case of a tenured teacher, the notice shall state the one or more statutory grounds for the dismissal or nonreemployment and the right

tion hearing should be held before the local school board, and that one of the crucial reasons for the hearing is to avoid mistaken employment decisions by affording the teacher a pretermination opportunity to be heard. After the board resolves the issue, the post-termination hearing is before a different tribunal, the hearing panel.)

The fact that a pretermination hearing must be offered to a tenured teacher does not mean that the hearing must be elaborate. A full evidentiary proceeding is not required. The hearing serves as an initial check against erroneous decisions but it need not definitely resolve the propriety of the discharge. The determination should serve to resolve whether reasonable grounds exist to believe that the charges against the employee are true, and whether the grounds support the proposed action.[19] Procedural due process is provided by a pretermination opportunity to respond, coupled with the elaborate post-termination procedures provided by §6-103.4.

The United States Supreme Court has established a four-part balancing test to determine whether due process requires a particular procedure:[20] (1) the private interest affected by offi-

---

of the teacher to have a hearing conducted by a hearing panel. In the case of a probationary teacher whose contract is not being renewed, the notice shall state the cause for nonrenewal and the right of the teacher to have a due process hearing conducted by the board of education. Pending final determination of a tenured or probationary teacher's dismissal or nonreemployment, the local board may have the teacher suspended if the board determines that the best interests and welfare of the students in the school district require such action. Such suspension shall not deprive the teacher of any compensation or other teaching benefits to which he or she would otherwise be entitled by law or pursuant to his or her teaching contract."

[17] Title 70 O.S. Supp. 1987 §6-102.4 provides in pertinent part:

"Whenever the local board of education or the administration of a school district shall determine that the dismissal or nonreemployment of a full-time certified administrator from his administrative position within the school district should be effected, the administrator shall be entitled to the

cial action; (2) the risk of an erroneous deprivation of the interest through the process provided; (3) the probable value of any additional or substitute procedural safeguards; and (4) the government's interests including any burden additional procedures may impose.

In *Wood v. Ind. School Dist. No. 141 of Pottawatomie County,* 661 P.2d 892, 896 (Okla. 1983), we weighed these same factors in determining whether hearsay evidence should be excluded from nontenured teachers' due process hearings. Although the balance was struck on the side of the school district in that instance, the existence of a tenured teacher's property interest in continued employment requires a different result — a pretermination hearing must be afforded.[21]

II

THE OPINION OF THE COURT SHALL BE GIVEN PROSPECTIVE EFFECT

We have determined that due process requires that tenured teachers facing either termination or nonrenewal must be afforded a pretermination op-

---

following due process procedures:

(1) A statement shall be submitted to the administrator in writing prior to the dismissal or nonreemployment which states the proposed action, lists the reasons for effecting the action, and notifies the administrator of his right to a hearing before the local board of education prior to the action; . . ."

[18] We express no opinion as to whether the provision of the opportunity for a pretermination hearing to a school administrator and the denial of the same type hearing to a tenured teacher presents a denial of equal protection.

[19] *Cleveland Bd. of Educ. v. Loudermill,* see note 4 at 545-46, supra; see also, *Bell v. Burson,* 402 U.S. 535, 540, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90, 95 (1971).

[20] *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

[21] See also, *Walters v. Oklahoma Ethics Comm.,* 746 P.2d 172, 176 (Okla. 1987).

portunity to be heard. It remains for us to determine whether a *Loudermill* hearing should be afforded full retroactive effect, purely prospective effect, or retroactivity limited to this case. Procedural due process requires notice and an opportunity to be heard before a decision is made to terminate or to nonrenew a tenured teacher's contract. However, neither the United States Constitution nor the Oklahoma Constitution mandate that judicial decisions be retrospectively operative. Rather, state courts are free to determine, as a matter of policy, the effective date of new rulings.[22]

In making such a determination, we must consider: (1) the purpose of the new rule; (2) the extent of reliance on old doctrines; and (3) the burden likely to be imposed on administering legal process due to additional litigation or curative actions.[23] The constitutionally defective procedure which has been in effect since 1977, provided a full panoply of protection *after* the decision to terminate or nonrenew a tenured teacher.

At the time Short's contract was nonrenewed, *Loudermill* had been promulgated for only two weeks. Therefore, the school board may not have known that a pretermination hearing was required to comport with procedural due process, and we find no other error in the proceedings. The new ruling corrects a prior defect caused by reliance on a constitu-

---

[22] *Linkletter v. Walker*, 381 U.S. 618, 628-29, 85 S.Ct. 1731, 1737, 14 L.Ed.2d, 601, 608 (1965); *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* 287 U.S. 358, 364-65, 53 S.Ct. 145, 148, 77 L.Ed. 360, 366 (1932); *Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 445 (Okla. 1986); *Cox v. Broadway*, 708 P.2d 1085, 1088 (Okla. 1985); *Griggs v. State ex rel. Oklahoma Dept. of Transp.*, 702 P.2d 1017, 1020 (Okla. 1985); *Thompson v. Presbyterian Hosp., Inc.*, 652 P.2d 260, 268 (Okla. 1982).

[23] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296, 306 (1971); *Linkletter v. Walker*, see note 22 at 629, supra; *Carlile Trust v. Cotton Petroleum*, see note 22 at 445, supra; *Thompson v. Presbyterian Hosp.*, see note 22 at 268, supra.

tionally infirm statute.[24] Were we to apply our holding retroactively to all previous termination or nonrenewal proceedings, the holding would adversely effect and increase the workload of school boards, the first arbitrators of termination and nonrenewal decisions; administrative hearing panels; and the final reviewing bodies, the appellate courts.

Generally, determinations of this nature turn upon considerations of fairness and public policy.[25] A careful weighing of the three applicable factors — purpose, reliance, and burden — [26] requires that our pronouncement be given purely prospective effect. This opinion shall be applicable prospectively to all termination or nonrewenal cases involving tenured teachers occurring after the mandate herein is issued.[27]

REVERSED

HARGRAVE, V.C.J., HODGES, LAVENDER, WILSON, KAUGER, JJ., concur;
DOOLIN, C.J., concurs in Part I, not voting in Part II;
OPALA, J., concurs in part, dissents in part;
SUMMERS, J., concurs in Part I, dissents from Part II;
SIMMS, J., dissents.

---

[24] Title 70 O.S. 1981 §6-103.4, see note 16, supra.

[25] See, *Chevron Oil Co. v. Huson*, note 23 at 106-07; supra; *Carlile Trust v. Cotton Petroleum Corp.*, note 22 at 448, supra.

[26] *Linkletter v. Walker*, see note 22 at 629, supra; *Carlile Trust v. Cotton Petroleum*, see note 22 at 445, supra; *Thompson v. Presbyterian Hosp.*, see note 22 at 268, supra.

[27] See, *Chevron Oil Co. v. Huson*, note 23 at 106-07; supra; *Carlile Trust v. Cotton Petroleum Corp.*, note 22 at 448, supra.

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 66,179

JOHNNY M. SHORT,
Appellant,

v.

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT
NO. 7 OF CHOCTAW COUNTY, OKLAHOMA,
Appellee.

[Filed July 19, 1988]

SIMMS, J., DISSENTING:

I dissent. The constitution does not require finding fault with the procedures used here in the nonrenewal of this teacher's contract. The majority's reliance on the Supreme Court decision in *Cleveland Board of Education v. Loudermill,* 470 U.S. 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), is misplaced as that action is clearly distinguishable and is not controlling here.

It is true that *Loudermill* held that some kind of hearing must be afforded an employee with a constitutionally protected property interest in his employment prior to discharge. The majority, however, misapprehends that holding as requiring a hearing before the *decision* is made to terminate or nonrenew a contract. It is not the employer's initial decision to terminate the employee which triggers the need for a hearing. It is, rather, the termination itself which must be accorded procedural safeguards. Due

process requires notice and the opportunity for a pretermination hearing before the employee is *deprived* of that protected property interest.

In my view, that is precisely what our statutes provide. They fully meet the requirement of *Loudermill* by affording an employee notice of the charges and a complete due process hearing providing an opportunity to respond and present his side of the story prior to the time the "termination takes effect". At 1494.

Mr. Short was not "terminated" when he received his notice. Under our statutory scheme Mr. Short continued to teach and received his wages and benefits under his existing contract from the time he received his notice in April until after his hearing, at the end of the school's fiscal year on June 30th. His evidentiary hearing, originally scheduled for May was continued *at his request* until June.[1] Pursuant to 70 O.S.1981, §6-103.4(B), a teacher, even if suspended, continues to work and receives wages following notice of a proposed contract nonrenewal or discharge until final determination of the action.

The majority dismisses as insignificant the very real differences between this case and *Loudermill.* Here Mr. Short continued to teach under the existing contract and drew wages until June 30, the end of the school's fiscal year and after his due process hearing. In *Loudermill,* however, the employees were summarily "terminated" with their notice; their wages were cut off and they lost their jobs. In representing this point as an "untenable" argument that "constitutional rights may be purchased in exchange for wages", the majority misapprehends the surrounding

---

[1] The Findings of Fact and Conclusions of Law of the Panel show that the hearing was originally scheduled for May 31, and was continued until June 24 and 25 at appellant's request. It also noted that counsel for appellant also "waived any objections to the date of the decision" in order to have additional time to study the transcript and prepare briefs.

constitutional principles. It is the wages in *Loudermill* which constitute the essence of the "significant property interest" that is entitled to constitutional protection; the wages cannot be taken away without due process of law. Constitutional protections do not exist in a vacuum. They arise to prevent the loss of a significant interest.

The decision in *Loudermill* is a reaction to the summary taking of wages. That is why the court points out there that if the government perceives a significant hazard in keeping an employee on the job until the appeal process is final, "it can avoid the problem by suspending with pay". At 1495.

That is precisely what Oklahoma has provided in its statutes.

Because Mr. Short and other employees are not "terminated" when they receive notice, there is no need for the protection of a "pretermination" hearing at any point prior in time to the 70 O.S.1981, § 6-103.4 hearing.

The majority's additional observation that the due process protection offered administrators by § 6-102.4 supports the result reached here is puzzling. Administrators, the majority points out, receive a hearing on their proposed dismissal or nonreemployment before the local board of education prior to its decision becoming final.

This, the majority says, is "procedural due process". This is to be distinguished, in the majority's opinion, from what is afforded tenured teachers under § 6-103.4, which the majority perceives as less than procedural due process. I do not agree with the majority's perception of § 6-102.4 as offering "better" or "more substantial" due process protections. I find rather that the procedure for hearing before the local board is "barebones" and quite limited. It is adequate only for the purpose for which it was designed

— to give minimal protection to *nontenured* employees — administrators and probationary teachers. Both groups, of course, have no claim to tenure. See: §§ 6-102.1(4)(6); 6-103.1; and *Bd. of Educ. Vici Schools v. Morris, Okl.*, 656 P.2d 258 (1983).

Under our statutes, both groups are entitled to only a hearing before the local board from which there is no right of appeal. Tenured teachers on the other hand are guaranteed many procedural protections for their hearing under § 6-103.4. Those statutes are set forth in the Appendix.

These statutes, together with § 103.4, appear to me to be a serious and studied effort by the Legislature to protect tenured teachers and guarantee them abundant procedural due process protections in meeting and refuting charges against them.

It occurs to me that while the majority believes it is adding protections for teachers, it is in reality taking them away. I do not believe that tenured teachers across the state will view striking § 103.4 with its attendant protections, and moving toward § 102.4 as a step up the rungs of the constitutional ladder.

In *Harrah Independent School District v. Martin*, 440 U.S. 197, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979), the Supreme Court held only that nonrenewal of a teacher's contract for her refusal to earn required college credits, was rationally related to the school board's objective of enforcing the continuing education obligation of its teachers and did not deprive her of equal protection. There the Supreme Court cautioned that their cases provide an "analytical framework" which should be employed in determining whether Fourteenth Amendment rights have been violated. The Court observed that while their decisions "do not form a checkerboard of bright lines between black squares and red squares, neither do they leave courts, and parties litigating federal constitutional

claims in them, quite as much at sea as the Court of Appeals apparently thought was the case." at 198. Following that advice in this case, leaves only the conclusion that constitutional rights have not been violated here. The "property interests" of tenured teachers are fully protected by our statutes. Mr. Short and those others similarly situated, receive notice and an opportunity to be heard before their discharge or nonrenewal is effected. They do not lose their wages or their positions pending the determination. Of what interest then are the individuals deprived without due process?

Our statutes provide, and this particular individual received, all due process requirements necessary to protect these property rights. I would so hold.

APPENDIX

§ 6-103.4. Dismissal or nonreemployment of teacher — Procedure

A. Whenever a superintendent of a school district determines that cause exists for the dismissal or nonreemployment of a teacher employed within the school district, he or she shall submit a recommendation in writing to the board of education for such school district. In the case of a tenured teacher, the recommendation shall contain the one or more statutory grounds for the potential dismissal or nonreemployment. The recommendation for the dismissal or nonreemployment of either a tenured or a probationary teacher shall be approved or rejected upon a majority vote of the board's members.

B. If the local board of education approves the recommendation of the superintendent, or determines on its own volition that a teacher should be dismissed or nonreemployed, the board shall cause written notice of the dismissal or nonreemployment to be mailed by certified mail, restricted delivery, with return receipt requested, to the teacher who is

the subject of the action. In the case of a tenured teacher, the notice shall state the one or more statutory grounds for the dismissal or nonreemployment and the right of the teacher to have a hearing conducted by a hearing panel. In the case of a probationary teacher whose contract is not being renewed, the notice shall state the cause for nonrenewal and the right of the teacher to have a due process hearing conducted by the board of education. Pending final determination of a tenured or probationary teacher's dismissal or nonreemployment, the local board may have the teacher suspended if the board determines that the best interests and welfare of the students in the school district require such action. Such suspension shall not deprive the teacher of any compensation or other teaching benefits to which he or she would otherwise be entitled by law or pursuant to his or her teaching contract.

C. Within ten (10) days of receipt of the notice, the tenured or probationary teacher shall notify by certified mail, restricted delivery with return receipt requested, the clerk of the local board of education of his or her respective decision.

D. If a tenured teacher fails to notify the clerk of the local board of education within the ten-day period of his or her desire to have a hearing on his or her dismissal or nonreemployment conducted by a hearing panel, the teacher shall be deemed to have waived his or her right to a hearing and the initial determination of his or her dismissal or nonreemployment by the board of education shall become final and nonappealable. If, within the ten-day period, the tenured teacher notifies the clerk of the local school board of his or her desire for a hearing conducted by a hearing panel, the clerk shall, not later than the end of said period of time, notify the State Superintendent of Public Instruction of such request.

E. If a probationary teacher fails to notify the clerk within the ten-day period of his or her desire to have a due process hearing on his or her dismissal or nonreemployment conducted by the local board of education, the teacher shall be deemed to have waived his or her right to the hearing and the initial determination of his or her dismissal or nonreemployment by the board of education shall become final and nonappealable. If, within the ten-day period, the probationary teacher notifies the clerk of the board of education of his or her desire to have a due process hearing on his or her dismissal or nonreemployment conducted by such board, the board shall, as soon as possible, hold a hearing. At the hearing the probationary teacher shall be afforded all such procedural due process rights as are guaranteed by the Oklahoma and United States Constitutions. At the conclusion of the hearing, the local board of education shall render a final and nonappealable decision on the question of the probationary teacher's dismissal or nonreemployment.

§ 6-103.5. Hearing judge list

A. There is hereby created a hearing judge list which shall consist of the names of not less than two hundred Oklahoma attorneys with trial experience provided by the Oklahoma Bar Association; provided, however, that no member of the Legislature shall be included on said hearing judge list or be eligible to serve as a hearing judge.

B. The individuals on the hearing judge list shall be appointed for terms of four (4) years or until their resignation or removal for cause by the State Board of Education or the Oklahoma Bar Association. Vacancies shall be filled in the same manner as provided for initial appointments. Individuals shall be eligible for reappointment to the hearing judge list.

C. Upon receipt of notification that a tenured teacher desires a hearing on his or her dismissal or

nonreemployment as provided in Section 6-103.4 of this title, the Superintendent of Public Instruction shall, within ten (10) days of receipt of notification, designate twenty-one individuals on the hearing judge list to be eligible to act as hearing judge. The individuals so designated shall represent at least three geographic areas of the state. The State Superintendent shall send a list of such individuals to the tenured teacher and local board of education.

D. The tenured teacher and the local board of education, or its representative, shall select a hearing judge within twenty (20) days of receiving the hearing judge list by one of the two following methods:

1. If both parties agree on one individual from the list to act as a hearing judge, such individual shall serve as hearing judge; or

2. If the parties cannot agree on one individual to act as hearing judge, each party shall eliminate ten names from the list and the remaining individual on the list shall serve as hearing judge. In the process of elimination, each party shall eliminate no more than one name at a time, the parties alternating after each name has been eliminated. The first name to be eliminated shall be chosen by the tenured teacher.

§ 6-103.6. Scheduling of hearing

A. The hearing judge shall schedule a hearing on the tenured teacher's dismissal or nonreemployment within ten (10) days after the judge is chosen. Upon scheduling the hearing, the hearing judge shall immediately notify the teacher of the time and place for the hearing and the procedures provided by law and by the State Board of Education pursuant to this act to be followed in selecting a hearing judge.

B. The hearing shall be held in the school district in which the tenured teacher is employed or suspended, in the county seat or in some other mutually agreeable place.

C. In his consideration of educational issues, the hearing judge shall be counseled and assisted by a person designated by the local board of education and a person designated by the tenured teacher. These three (3) individuals shall compose the hearing panel.

§ 6-103.7. Procedural due process to be afforded

At the hearing, and until final disposition of the case, the district superintendent or his designee shall represent the local board of education. The tenured teacher and district superintendent or his designee, as the representative of the local board of education, shall be afforded procedural due process at the hearing, including the following rights:

1. To have counsel of his own choice present;

2. To present witnesses in person or to present their testimony by interrogatories, affidavits or depositions. A list of any witnesses which are to be presented shall be furnished to the other party at least five (5) days before the hearing is scheduled;

3. To testify in his own behalf and give reasons for any actions or policies;

4. To have an orderly hearing;

5. To have a fair and impartial decision based upon the evidence; and

6. To have an official transcript of the hearing made.

§ 6-103.8. Powers of hearing judge

At the hearing, the hearing judge may:

1. Administer oaths;

2. Issue subpoenas for the attendance and testimony of witnesses and the production of books, papers and documents relating to any matter under investigation;

3. Receive evidence and limit lines of questioning and testimony which are repetitive, cumulative or irrelevant;

4. Call and examine witnesses and introduce into the record documentary and other evidence;

5. Preside over the course of the hearing and dispose of procedural requests, motions and similar matters; and

6. Take any other action necessary to make the hearing accord with administrative due process.

§ 6-103.9. Rules of evidence — Proof

A. The rules of evidence set forth in Section 310 of Title 75 of the Oklahoma Statutes shall apply to all hearings authorized by this act. The standard of proof shall be by the preponderance of the evidence and the burden of proof at the hearing shall be on the district superintendent or his designee, as representative of the local board of education, to establish that the teacher's dismissal or nonreemployment is warranted.

B. The State Board of Education shall develop uniform standards and procedures to be used at such hearings; provided, the hearings shall be governed in all respects by the provisions of the Oklahoma Administrative Procedures Act.

§ 6-103.10. Compensation of hearing panel — Costs

A. The members of the hearing panel shall be compensated for serving in such capacity in an amount to be determined in advance by the adoption of appropriate rules and regulations by the State Board of Education.

B. The local board of education and the tenured teacher shall each be responsible for fifty percent (50%) of the expenses and cost of the hearing and the official transcript, excluding attorney's fees of the parties involved.

§ 6-103.11. Written report — Contents

A. Within thirty (30) days from the time a hearing judge has been chosen, the hearing panel shall complete the hearing, prepare a written report and submit copies of the report to the superintendent of the school district and the tenured teacher. The report shall be written by the hearing judge. If the hearing panel cannot prepare the report within said period of time, the tenured teacher and superintendent of the school district shall be so notified prior to the end of such period. The hearing panel may then take additional time as is necessary, not to exceed forty (40) days from the time that the hearing judge was chosen, to prepare and submit the report. The tenured teacher and district superintendent or their designees may mutually agree to extend the time limit for preparation and submission of the report to an additional fifteen (15) days.

B. The report shall contain an outline of the scope of the hearing, findings of fact and conclusions of law and shall direct either of the following:

1. That the local board of education reinstate the tenured teacher with full employment status and benefits; or

2. That the decision of the local board of education for the dismissal or nonreemployment of the tenured teacher be sustained.

§ 6-103.12. Decision final

The decision of the hearing panel as contained in the report shall be final and shall be obeyed by the parties involved unless the tenured teacher or the district superintendent, as representative of the local board of education, appeals the decision to the district court. The provisions of the Oklahoma Administrative Procedures Act shall apply to such appeal.

§ 6-103.13. Hearing and appeal procedure

The applicable hearing and appeal procedure in the event of the dismissal or nonreemployment of a tenured teacher shall be that procedure provided by law on the effective date of such dismissal or nonreemployment.

APPENDIX B

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR CHOCTAW COUNTY,
STATE OF OKLAHOMA

Number C-85-214

JOHNNY M. SHORT,
Appellant,

vs.

KIAMICHI AREA VOCATIONAL-TECHNICAL
SCHOOL DISTRICT # 7,
Appellee.

ORDER

NOW on this 21st day of February, 1986, the above entitled matter comes on for decision. The case had been filed as an appeal from an administrative ruling, briefs have been filed and oral argument was heard by the Court.

The undersigned Court recognizes that the Court is, in this case, functioning as an appellant body and that this is not a trial de nova. [*Ricks Exploration Company vs. Oklahoma Water Resources Board,* OKL., 695 P.2d 498 (1984); *Lowry vs. Board of Chiropractic Examiners,* OKL., 631 P.2d 737 (1981); *Banking Board of the State of Oklahoma vs. Wilkerson,* OKL., 642 P.2d 1141 (1982)] The Court has reviewed the transcript and the documents placed into evidence in the administrative hearing before Harold M. Schultz, Jr. as Hearing Judge. The Court has also reviewed the Decision and Order of that panel. This Court would also state, for clarification of the record, that I recognize that part of the basis of appeal is upon the

definition of "neglect of duty" as the cause or condition for the refusal by the Appellee to renew Mr. Short's teaching contract.

It would be the finding of this Court that the findings of fact and conclusion of law reached by the hearing board, with Mr. Schultz as Hearing Judge, are supported by the evidence and therefore proper. The Court recognizes that the conclusion by that board would also carry the inference that the failure of Mr. Short to become qualified as an instructor in industrial electronics would be a neglect of duty and the Court finds that there is adequate evidence presented to the board, as shown in the transcript and documents which were entered into evidence, to support that conclusion by the board.

IT IS THEREFORE FOUND BY THE COURT AND HEREBY ORDERED that the Decision and Order of the hearing panel should be and the same is hereby affirmed.

/s/G. GAIL CRAYTOR
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of February, 1986, at the request of G. Gail Craytor, District Judge, I mailed a true and exact copy of the foregoing ORDER to the following persons:

Karen L. Long
Oklahoma Education Association
P.O. Box 18458
Oklahoma City, OK 73154
Attorney for Appellant

Ronald L. Day
Suite 200
228 Robert S. Kerr Avenue
Oklahoma City, OK 73102-5281
Attorney for Appellee

Harold M. Schultz, Jr.
Hearing Judge
401 Fenwick Place
Muskogee, OK 74403

Mrs. Winona Wettengel
Chief Executive Secretary
Oklahoma State Board of Education
2500 North Lincoln Boulevard
Oklahoma City, OK 73105

/s/Melissa Lewis

APPENDIX C

APPENDIX C

STATE OF OKLAHOMA

APPEAL

JOHNNY SHORT,

Appellant,

vs.

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7,

Appellee.

DECISION AND ORDER

Comes now, Harold M. Schultz, Jr., Hearing Judge; Dean Myers, Panel Member, and Dan Hattaway, Panel Member, all selected jointly and or individually by the parties in this matter, and state or find as follows:

I

HEARINGS

1. The Hearing Judge was notified by the Executive Secretary of the State Board of Education of his selection by the parties hereto on May 7, 1985, and by agreement, Hearing was originally set for May 31, 1985 at the Kiamichi Vocational Technical School at McAlester, Okla.

2. However, Hearing on this Appeal was subsequently rescheduled, pursuant to the request of Counsel for Appellant, and was held and heard on June 24 and 25, 1985 at the above named school. Said Counsel has also waived any objections to the Hearing on this latter date, and has waived any objections to the date of this Decision, in order that the Panel and both Attorneys would have time to receive and

study the Transcript, and additional time for Counsel to prepare and submit briefs and "Proposed Findings of Fact and Conclusions of Law" for the benefit of the Hearing Panel.[1,2]

3. Apellant was represented by Ms Karen Long, General Counsel for the Oklahoma Education Association, and Appellee was represented by Mr. Ron Day, of Fenton, Fenton, Smith, Reneau and Moon, Attorneys at Law.

4. Due to the complexity of this Appeal, the Hearing Panel met again on August 1, 1985, from 4 PM to 7 PM, at 401 Fenwick, Muskogee, Okla., and rendered this Decision and Order, all (only) three members being present.

II

FINDINGS OF FACT

1. Appellant Johnny Short (hereinafter referred to as 'Teacher') has been employed by Appellee (hereinafter referred to as 'School'), at its Hugo campus or branch, for 11 school years, and for most of that time taught a course called 'Residential Wiring', for which he was fully qualified and licensed by the State Department of Vocational Technical Education.

2. Teacher was advised by letter from School's Superintendent on May 7, 1976, that the responsibility of continuing Certification was between the individual Teacher and the State Department of Vocational Technical Education (hereinafter referred to as 'State Votek'). [School Ex 3]

3. The School decided to upgrade this course taught by Teacher, by including Electricity and Electronics,

---

[1] Transcript, Page 2 (Transcript received by HJ & Day 7-11-85, by Long 7-16-85)

[2] Proposed 'Findings, etc' of Appellent received by HJ 7-25-85; those of Appellee received by HJ 7-22-85.

and renamed the course 'Industrial Electricity/Electronics', and so notified the State Votek, commencing with the 1982-1983 school year. [School Ex 5, 22]

4. Teacher testified he was advised by State Votek and Director Wibben that his 'Residential Wiring' course was to be upgraded and enlarged, and would include *Electricity/Electronics,* by State Votek and his Director Wibbens as early as the first half of calendar year 1982. [Transcript pp 90, 91, 92]

5. School thereafter, on October 4, 1982, purchased certain Electronic Equipment in the amount of $56,613 from Technical Lab. Systems of Houston, Texas. This equipment was received December 7 and 8, 1982, January 4 and 8, 1983, and April 12, 1983. [School Ex 22]

6. This equipment was placed in the classroom/shop used by Teacher, who attempted to use, learn or become familiar with same. [School Ex 7, 4, 5], [Transcript pp 188, 276]

7. School did not advise or inform Teacher, at any time, that the upgraded course in Industrial Electricity/Electronics at the Hugo branch would be staffed by an additional instructor.
[Panel notes that School's Idabel branch had *two* instructors, and the Poteau branch *one* instructor, in a similar course, and that the State Votek did suggest in a letter to School's Superintendent on 2-12-1985 that there be two instructors at the Hugo branch because Teacher was not qualified in Electronics. [Teacher Ex 1]]

8. Teacher has also taken and *passed,* in the spring of 1982, a "NOCTIE" test for 'Millwright' which increased his qualifications in Commercial Wiring. Teacher also attended a seminar given by State Votek on 'Curriculum Dissemination and Inservice' for Industrial Electricity and Electronics in August of 1984. [Transcript p 91, 372], [School Ex 5]

9. Schools Hugo director Wibben testified he advised Teacher *verbally* in October, 1983, Spring of 1983, and December, 1983, that Teacher must be qualified in the School's *Electronic Equipment.* (Par 5, supra). Teacher testified that he was not informed until 1-28-85 that he needed to be certified in 'Electronics'. [Transcript pp 155, 157, 159, 163, 164], [Transcript p 137]

10. Teacher did not make an effort to become qualified as an 'Electronics instructor' *through the State Votek* until so instructed by School's Superintendent through the Hugo Director on Feb. 12, 1985, whereupon he took, and failed, a "NOCTIE" test in Electronics on March 6, 1985, arranged for by said State Votek. [School Ex 11, 12, 12A, 13]

11. School's Deputy Superintendent testified that School did not 'just' drop Residential Wiring at the end of one School Year, and immediately offer or start a new course in Industrial Electricity/Electronics for the next School Year for the reason and in order that School wanted Teacher to have ample time and ample opportunity (3 School years) to become Certified in Electronics through State Votek. [Transcript pp 218, 219]

12. Residential or Commercial Wiring/Electricity will not be offered, either as a separate course, or included in the new Industrial Electricity/Electronics course beginning in School Year 1985-1986, and the Instructor for this course in 1985-1986 must be certified in Electronics by the State Votek. [Transcript pp 238-251]

13. Mr. Leonard Cokeley, Asst. Supervisor for State Votek's Trade and Industrial Education Division (T & I), evaluated the course taught by Teacher on Oct. 3, 1984, and found that Teacher was not competent or proficient in *Electronics.* [Transcript 266-271, 285-286]

14. There is no course being offered in School Year 1985-1986 at School's Hugo Branch or Campus for which Teacher is certified to teach.

15. There is no evidence that School's Superintendent ever submitted a recommendation in writing to the Board of Education that Teachers contract not be renewed for the 1985-1986 School Year. [Joint Ex 1, 2]

III

CONCLUSIONS OF LAW

1. Mr. Johnny Short is a tenured teacher as defined by Oklahoma Statute. [70 O.S. Sec. 6-102.1(6)]

2. Although normal procedure indicates a written recommendation from a Superintendent for the non-renewal of a contract with a tenured teacher, a Board of Education may make such a decision *upon it's own volition.* The action taken by the Board in this matter in its April 1, 1985 meeting is therefore sufficient.

3. The decision of the United State Supreme Court in *'Cleveland Board of Education* v. *Laudermill, et al'*, 53 U.S.L.W. 4306 (1985) states that the only Due Process required under Ohio Law for dismissal of a Teacher is a Pre-Termination "opportunity to respond" and a Post-Termination Administrative appeal to the Cleveland Civil Service Commission.

Oklahoma Law *exceeds* the Ohio Law, since it provides for a full review in a Due Process Hearing before an independent, 3 member, Quasi-Judicial Administrative Hearing Panel, with one panel member selected by Teacher, one panel member selected by School, and a presiding Hearing Judge (a qualified Attorney) selected jointly by the School and Teacher.

The Laudermill decision *does not apply* in this proceeding because of paragraph 4, infra, 'Findings' paragraphs 12 and 14, supra, and because Teacher received full payment on his existing contract.

4. School has the right to eliminate a course offering only Residential Wiring and Electricity in School Year 1984-1985, and to offer for the 1985-1986 School Year, a course in Industrial Electricity/Electronics, to define the context of such new course, and to require that an instructor for the new course be qualified, and certified by State Votek in *'Electronics'*.

5. Teacher had the duty and responsibility of acquiring the training necessary for the 'Industrial Electricity/Electronics' course for the 1985-1986 School Year, *and* to secure the required certification in *Electronics* from State Votek.

IV

PENDING MOTIONS

1. Teacher's Pre-Hearing Motion for Reinstatement is hereby *DENIED.*

2. Teacher's Demurrer to School's Evidence is hereby *DENIED.*

V

DECISION

The Hearing Panel, on August 1, 1985, voted on the proposition "Shall the action of the School Board on April 1, 1985 be *Upheld* or *Overruled*?" as follows, and in this order:

Panel Member Hattaway	Overruled
Panel Member Myers	Upheld
Hearing Judge Schultz	Upheld

It is therefore, the decision of this Hearing Panel that the action of the School Board on April 1, 1985, relative to JOHNNY SHORT is hereby:

UPHELD

Witness my hand this 1st day of August, 1985:

/s/Harold M. Schultz, Jr.
HEARING JUDGE

APPENDIX D

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Tuesday, September 13, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

57,121 Minnie Marie Hopkins Silk v. Phillips Petroleum Company.
Rehearing denied.
CONCUR: Doolin, C.J., Lavender, Simms, Opala, Summers, JJ.
DISSENT: Hodges, Wilson, Kauger, JJ.
DISQUALIFIED: Hargrave, V.C.J.

64,977 Travis L. Mann, a minor et al. v. Farmers Insurance Company, Inc. et al.
Rehearing denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Lavender, Simms, Opala, Summers, JJ.
DISSENT: Hodges, Wilson, JJ.
RECUSED: Kauger, J.

66,179 Johnny M. Short v. Kiamichi Area Vocational-Technical School District No. 7 of Choctaw County, Oklahoma.
Rehearing denied. Petition to file amicus curiae brief denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Hodges, Lavender, Opala, Wilson, Kauger, JJ.
DISSENT: Simms, Summers, JJ.

66,393 Edward L. Fretwell et al. v. Protection Alarm Company.
Rehearing denied. Motion for attorney fees denied. Motion for costs granted.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Lavender, Wilson, Kauger, Summers, JJ.
DISSENT: Hodges, Simms, Opala, JJ.

66,479 Rebecca S. Zbornik v. Dept. of Corrections of the State of Oklahoma.
Certiorari denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Hodges, Lavender, Simms, Summers, JJ.
DISSENT: Opala, Wilson, Kauger, JJ.

67,086 Roy D. Goodner v. Julie G. Sorenson et al.
Certiorari denied.
CONCUR: Hargrave, V.C.J., Hodges, Lavender, Simms, Opala, Wilson, Kauger, Summers, JJ.
DISQUALIFIED: Doolin, C.J.

68,507 J.R. Randolph v. Liberty Glass Company, Truck Insurance Company and Workers' Compensation Court.
Rehearing denied.
CONCUR: Doolin, C.J., Hodges, Lavender, Wilson, Kauger, Summers, JJ.
DISSENT: Hargrave, V.C.J., Simms, Opala, JJ.

68,516 Reda Pump Division of TRW, Inc. v. State of Oklahoma ex rel. Oklahoma Tax Commission.
Certiorari denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Hodges, Lavender, Simms, Opala, Kauger, Summers, JJ.

68,603 Dan W. Sharp and Lovetta Sharp v. Mohammed A. Quadeer and Saleem F. Quadeer.
Certiorari denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Lavender, Opala, Wilson, Kauger, Summers, JJ.
DISSENT: Hodges, Simms, JJ.

/s/Ralph B. Hodges
ACTING CHIEF JUSTICE

Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-974

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7,
Petitioner,

v.

JOHNNY S. SHORT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

BRIEF IN OPPOSITION

DAVID MORRIS
RICHARD WILKINSON
323 E. Madison
P.O. Box 18485
Oklahoma City, OK 73154

ROBERT H. CHANIN *
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

JOY L. KOLETSKY
1201 - 16th Street, N.W.
Washington, D.C. 20036

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

QUESTIONS PRESENTED

1. Where the decision of the Oklahoma Supreme Court gave no relief to respondent, and a reversal of the ruling challenged in the Petition for Certiorari would not affect the rights of the litigants, does a case or controversy exist within the meaning of Article III? If so, is the case in a proper adversarial posture for review by this Court, inasmuch as respondent has no interest in defending the decision as it stands?

2. If the answers to the preceding questions are yes, does the decision of the Oklahoma Supreme Court warrant review by this Court, where the decision merely defines the point in Oklahoma's procedures for nonrenewal of a tenured teacher's contract at which notice and an opportunity to respond must be provided in order to afford the teacher a meaningful opportunity to invoke the discretion of the decisionmaker, as required by this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	4
I. The Petition Does Not Present a Case or Controversy Within the Meaning of Article III; and the Case is Not in Any Event in a Proper Adversarial Posture for Review By This Court	4
II. The Issue Presented Does Not Merit Review By This Court	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	*passim*
DeFunis v. Odegaard, 416 U.S. 312 (1974)	4, 5
Griffith v. Kentucky, —— U.S. ——, 107 S.Ct. 708 (1987)	5
Linkletter v. Walker, 381 U.S. 618 (1965)	5
Montana v. Kennedy, 366 U.S. 308 (1961)	7
North Carolina v. Rice, 404 U.S. 244 (1971)	4
Ross v. Moffitt, 417 U.S. 600 (1974)	7
Simpson v. Union Oil Co., 396 U.S. 13 (1969)	5
Stovall v. Denno, 388 U.S. 293 (1967)	5
Statutes and Constitutional Provisions:	
U.S. Constitution, Article III	4, 5
Oklahoma Statutes, Title 70	1, 2, 6, 7
§ 5-117A(14)	7
§§ 6-103.4-.13	1
§ 6-103.11(B)	2, 6, 7
§ 6-103.12	2
Court Rules:	
Supreme Court Rule 17	7
Supreme Court Rule 20.5	4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-974

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7,
Petitioner,

v.

JOHNNY S. SHORT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

BRIEF IN OPPOSITION

Respondent Johnny S. Short submits this brief in opposition to the Petition for Certiorari filed by Kiamichi Area Vocational-Technical School District No. 7.

STATUTES INVOLVED

The provisions of Okla. Stat. tit. 70, §§ 6-103.4-.13 are set out in the appendices to the Petition for Certiorari ("Pet. App.") at 18a-25a.

STATEMENT OF THE CASE

Respondent Johnny Short was a tenured teacher employed by petitioner Kiamichi Area Vocational-Technical School District No. 7 ("School District"). On April 1, 1985, without having afforded Short any notice or opportunity to be heard, the Board of Education of the School District made a decision not to renew Short's teaching contract for the upcoming 1985-86 school year on the ground of "willful neglect of duty," due to the fact that Short had not secured certification as an electronics instructor. Pet. App. 3a, 5c. Whether Short had been informed in timely fashion of the need to obtain this certification, and whether the circumstances of his failure to obtain the certification were such as to amount to willful neglect of duty, are strongly disputed. *See id.* at 3a, 7a. On April 2, 1985, the Board informed Short of its decision by certified mail. *Id.* at 3a.

Although Short never was afforded any opportunity to be heard by the *School District*, under Oklahoma law he had the right to appeal the School District's action before a Hearing Panel chaired by an independent hearing judge selected from a list prepared by the State Superintendent of Public Instruction. *See* Okla. Stat. tit. 70, § 6-103.4-.13. The Oklahoma statute provides that the Hearing Panel is to issue a report, which must satisfy the following requirements:

> The report shall contain an outline of the scope of the hearing, findings of fact and conclusions of law and shall direct either of the following:
>
> 1. That the local board of education *reinstate* the tenured teacher with full employment status and benefits; or
>
> 2. *That the decision* of the local board of education for the dismissal or nonreemployment of the tenured teacher *be sustained* [§ 6-103.11(B) (emphasis added)].

In Short's case the hearing judge was selected in May 1985, the hearing was held on June 24 and 25, 1985, and the panel's decision was issued on August 1, 1985. Pet. App. 1c, 7c. The decision of the Hearing Panel was "that the action of the School Board on April 1, 1985, relative to Johnny Short is hereby UPHELD." *Id.* at 7c.

Short appealed the Hearing Panel's decision to the district court of Choctaw County in accordance with the provisions of Okla. Stat. tit. 70, § 6-103.12. The district court entered an order affirming the decision of the Hearing Panel. Pet. App. 1b-2b.

On appeal of the district court's decision, the Oklahoma Supreme Court held that the Oklahoma statutory scheme falls short of the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in that it provides for notice and an opportunity to be heard only *after* a school district has made the decision to nonrenew a tenured teacher's contract. While recognizing that a "full evidentiary proceeding" need not be provided prior to the school district's action, the Oklahoma Supreme Court stated that to comply with *Loudermill*, "a pretermination opportunity to respond" must be afforded. Pet. App. 10a.

Although Short had not been afforded such an opportunity, the Oklahoma Supreme Court did not provide him with any relief. Instead, the court declared that its "pronouncement [would] be given purely prosepective effect," *id.* at 13a, and would not apply to Short's own case, *id.* at 12a. As the basis for that disposition, the court stated that "[a]t the time Short's contract was nonrenewed, *Loudermill* had been promulgated for only two weeks. Therefore the school board may not have known that a pretermination hearing was required. . . ." Pet. App. 12a.

The School District petitioned this Court for a writ of certiorari. Subsequently, Short filed a Cross-Petition, docketed as No. 88-1148, presenting the question whether

the Oklahoma Supreme Court's refusal to apply *Loudermill* in Short's case violates the Supremacy Clause. However, in the Cross-Petition Short stated that he does not wish to continue this litigation, and he urged the Court to deny the School District Petition, acknowledging that this would in turn preclude the granting of Short's Cross-Petition. *See* Cross-Petition at 6-7, citing Supreme Court Rule 20.5.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Present a Case or Controversy Within the Meaning of Article III; and the Case is Not in Any Event in a Proper Adversarial Posture for Review by This Court.

As noted, the decision of the Oklahoma Supreme Court provided no relief whatever to Short. He therefore has no interest in defending that decision as it stands.[1] In these circumstances, there is a strong argument that the Court lacks jurisdiction to entertain the School District's petition because there is no case or controversy as required by Article III.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974), quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).[2] Largely for that reason, it is the almost invariable practice of this Court, even when it determines that a newly declared rule of law should be applied only prospectively, to apply the rule to the parties in the case

[1] Short would, however, have an interest in the case if the Court were to grant his Cross-Petition for Certiorari, as it would then be possible for him to seek relief. But, as stated, Short would prefer that both petitions be denied.

[2] This is true even if the case is brought up from a state court that had jurisdiction as a matter of state law, and even if state law would continue to view the matter as justiciable. *DeFunis*, 416 U.S. at 316.

in which the rule is announced. *See* generally *Griffith v. Kentucky*, —— U.S. ——, 107 S. Ct. 708, 715-16 (1987). Of prime importance here, the Court has described this practice as "*rooted in the command of Article III* that [the Court] resolve issues solely in concrete cases or controversies. . . ." *Stovall v. Denno*, 388 U.S. 293, 301 (1967) (emphasis added). *See also Griffith v. Kentucky, supra*, 107 S.Ct. at 713; *Simpson v. Union Oil Co.*, 396 U.S. 13, 14 (1969). *But see Linkletter v. Walker*, 381 U.S. 618, 622 n.3 (1965) (questioning whether the Court is invariably "prevented by Article III from adopting the technique of purely prospective overruling"). We therefore submit that as a result of the Oklahoma Supreme Court's refusal to apply its construction of *Loudmill* in Short's own case, no case or controversy is presented by the School District's petition. Put simply, this Court's reversal of the ruling that is challenged by the School District "[would not] affect the rights of litigants in the case before [the Court]." *DeFunis*, 416 U.S. at 316.

But in determining whether certiorari should be granted, there is no need to reach a firm conclusion with respect to this Article III question. It is enough to recognize that if the School District petition were granted, this Court would be presented with a proceeding in which the respondent has no practical interest in the outcome.[3] We respectfully submit that this consideration militates strongly against granting the School District's petition.

II. The Issue Presented Does Not Merit Review By This Court.

The School District's contention is that the Oklahoma Supreme Court should have determined that "*Loudermill* is . . . distinguishable" from this case, Petition for Certiorari at 12, because, according to petitioner, the termination of Short's employment did not "take[ ] effect

---

[3] As we have acknowledged, this problem will not exist if Short's cross-petition is granted as well. See *supra* note 1.

and become[ ] final" until after a hearing had been provided. *Id.* This argument is based on the fact that Short taught for the 1984-85 school year, and then received a hearing from the Hearing Panel before the 1985-86 school year began.[4] Petitioner contends that it is the decision of the Hearing Panel, rather than the decision of the School District, that constitutes the "termination" which, under *Loudermill*, must be preceded by notice and an opportunity to respond. *See* Petition at 12-13.

However, the court below did not misapply *Loudermill* in concluding that under the Oklahoma procedures, the constitutional requirement of notice and an opportunity to respond comes into play at the point at which the *school district* is deciding whether to nonrenew a tenured teacher's contract.

The statute itself states that if the Hearing Panel does not sustain the decision of the local board of education, the panel shall direct the local board to "*reinstate* the tenured teacher . . .," Okla. Stat. tit. 70, § 6-103.11(B) (emphasis added). This certainly implies that in the contemplation of the statute, the decision of the school district operates in and of itself to terminate the teacher's employment.

But the application of *Loudermill* does not in any event turn on whether the process of termination has reached its final point before notice and an opportunity to respond are provided. One of the key considerations underlying the requirement in *Loudermill* of a pretermination hearing is that a hearing must be provided when there is still a "meaningful opportunity to invoke the discretion of the decisionmaker." Loudermill, 470 U.S. at 543. *See also id.* at 544 (noting that if Loudermill

---

[4] Short did not, however, receive a *decision* from the Panel until after the July 1 commencement of the fiscal year, which is the point at which his contract for 1985-86 (albeit not his pay for that year) would gone into effect had the School District not determined to nonrenew his contract.

had been allowed a pretermination hearing, "a fully informed decisionmaker might . . . have exercised its discretion and decided not to dismiss him notwithstanding its authority to do so"). In Oklahoma it is the *employer—i.e.*, the *school district*—that has the discretion to determine whether a teacher who arguably *could* be terminated *should* be terminated. *See* generally Okla. Stat. tit. 70, § 5-117A(14) (granting to the board of education of each local school district the power to operate and manage the schools, including the power to contract with teachers and to fix their terms of employment). The role of the Hearing Panel is not to exercise discretion, but simply to determine whether the school district's action can be "sustained." Okla. Stat. tit. 70, § 6-103.11(B). Thus, it is fully consistent with *Loudermill* to hold that notice and an opportunity to respond must be provided before the public *employer*, in this case the local school board, decides to terminate an employee, and that it is not enough to provide a hearing before a reviewing body after that decision has been made.

But there is no need to belabor the point, because "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment [the Court is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). *See* Supreme Court Rule 17. Petitioner has offered nothing to indicate that the question it seeks to present to the Court is of sufficient importance to merit review. The question turns in large part on the particular procedures followed in one state, and petitioner does not claim that the decision of the Oklahoma Supreme Court conflicts with that of any other state or federal court. Nor does the decision work any harsh result. *Cf. Montana v. Kennedy*, 366 U.S. 308, 309 (1961) (granting certiorari "in view of the apparent harshness of the result entailed"). This Court has recognized that a requirement of notice and an

opportunity to respond "impose[s] neither a significant administrative burden nor intolerable delays," *Loudermill*, 470 U.S. at 544; and the decision of the Oklahoma Supreme Court merely defines the point at which Oklahoma school districts must in the future provide those rudimentary procedures of due process.

Thus, even if there were reason to question the correctness of the decision below (*but see supra* at 6-7), and even if a live case or controversy existed (*but see supra* at 4-5), the question presented by the petition for certiorari would not warrant inclusion in this Court's crowded docket.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.[5]

Respectfully submitted,

DAVID MORRIS
RICHARD WILKINSON
323 E. Madison
P.O. Box 18485
Oklahoma City, OK 73154

ROBERT H. CHANIN *
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

JOY L. KOLETSKY
1201 - 16th Street, N.W.
Washington, D.C. 20036

* Counsel of Record

---

[5] If the petition is denied, Short's cross-petition will necessarily be denied as well, *see* Supreme Court Rule 20.5, and the litigation will be at an end. But if the Court grants the School District petition, it should also grant Short's cross-petition, for the reasons stated herein and in the cross-petition.